APPENDIX.

Alabama Statutes

Indictment Against P. F. Strumpf

Indictment Against Polakow's Realty Experts, Inc.

Sections 298 to 303, Alabama Real Estate Law,
Title 46, Chapter 14,
Alabama Code 1940.

"Sec. 298. License Required.—It shall be unlawful for any person, copartnership, association or corporation to act as a real estate broker or real estate salesman, or to advertise or assume to act as such real estate broker or real estate salesman without a license issued by the Alabama real estate commission. No co-partnership, association or corporation, shall be granted a license, unless every member or officer of such co-partnership, association or corporation, who actively participates in the brokerage business of such co-partnership, association or corporation, shall hold a license as a real estate broker or salesman, as hereinafter provided for, and unless every employee who acts as a salesman for such a co-partnership, association shall hold a license as a real estate salesman.

"Sec. 299. Definitions; to whom chapter applies.—A real estate broker within the meaning of this chapter is any person, firm, partnership, co-partnership, association or corporation, who, for compensation or valuable consideration, sells or offers for sale, buys or offers to buy, negotiates the purchase or sale or exchange of real estate, or who leases or offers to lease, rents or offers for rent, any real estate or the improvements thereon for others, as a whole or partial vocation. The term 'real estate' as used in this chapter shall include leaseholds and other interests less than leaseholds. A real estate salesman within the meaning of this chapter is any person who, for a compensation or valuable consideration, is employed either directly or indirectly by a real estate broker to sell or offer to sell, or to buy or offer to buy, or to negotiate the purchase or sale or exchange of real

estate, or to lease, to rent or offer for rent any real estate, or to negotiate leases thereof, or of the improvements thereon, as a whole or partial vocation. One act for a compensation or valuable consideration of buying or selling real estate of or for another, or offering for another to buy or sell, or exchange real estate, or leasing, or renting, or offering to rent real estate, except as herein specifically excepted, shall cause the person, firm, partnership, co-partnership, association or corporation, performing, offering, or attempting to perform any of the acts enumerated herein to become a real estate broker or a real estate salesman within the meaning of this chapter. The provisions of this chapter shall not apply to any person, co-partnership, association or corporation, who as owner or lessor shall perform any of the acts aforesaid with reference to property owned or leased by them, or to the regular employees thereof, with respect to the property so owned or leased, where such acts are performed in the regular course of, or as an incident to, the management of such property and the investment therein, nor shall the provisions of this chapter apply to persons acting as attorney-in-fact under a duly executed power of attorney from the owner authorizing the final consummation by performance of any contract for the sale, leasing, or exchange of real estate, nor shall this chapter be construed to include in any way the services rendered by an attorney-at-law, in the performance of his duties as such attorney-at-law; nor shall it be held to include, while acting as such, a receiver, trustee in bankruptcy, administrator or executor, or any person selling real estate under order of court, nor to include a trustee acting under a trust agreement, deed of trust, or will, or the regular salaried employees thereof.

"Sec. 300. Creation of real estate commission; members; compensation; expenses, etc.—There is hereby created the Alabama real estate commission. The governor shall appoint three persons, each of whom immediately prior to the date of his appointment has been a resident of the state for five years, and whose vocation for a period of at least five years shall have been that of a real estate broker or real estate salesman; the term of the members of said commis-

sion shall be for three years, and until their successors are appointed and qualify. There shall at no time be more than one commissioner from any one county. Members to fill vacancies shall be appointed for the unexpired term. The commission immediately upon the qualification of the member appointed in each year shall organize by selecting from its members a chairman, and may do all things necessary and convenient for carrying into effect the provisions of this chapter and may from time to time promulgate necessary rules and regulations. Each member of the commission shall receive as full compensation for each day actually spent on the work of said commission the sum of ten dollars per day and his actual and necessary expenses incurred in the performance of duties pertaining to his office. The commission shall employ, and at its pleasure discharge, a secretary and such clerks and assistants as shall be deemed necessary to discharge the duties imposed by the provisions of this chapter, and shall outline their duties and fix their compensation, subject to the general laws of the state. The commission shall obtain such office space, furniture, stationery, fuel, light, and other proper conveniences as shall be reasonably necessary for carrying out the provisions of this chapter. The principal office shall be located in the city of Montgomery, Alabama. The commission shall adopt a seal with such design as the commission may prescribe engraved thereon, by which it shall authenticate its proceedings. Copies of all records and papers in the office of the commission, duly certified and authenticated by the seal of said commission shall be received in evidence in all courts equally and with like effect as the original. All records kept in the office of the commission under authority of this chapter shall be open to public inspection under such rules and regulations as shall be prescribed by the commission. All fees and charges collected by the commission under the provisions of this chapter shall be paid into the treasury, and shall constitute a separate fund to be disbursed by the treasurer on order of the board of commissioners and with the approval of the governor. All expenses incurred by the commission under the provisions of this chapter, including the compensation of members, secretaries, clerks

and assistants shall be paid out of the separate fund in the treasury upon warrants of the comptroller drawn upon the treasurer from time to time when vouchers therefor are exhibited and approved by the commission and approved by the governor. The treasurer is directed to pay out of the separate fund hereinabove provided upon the order of the secretary of the board of commissioners, countersigned by the chairman of the board of commissioners and approved by the governor, provided the total expenses for every purpose incurred shall not exceed the total fees and charges collected and paid into the state treasury and all moneys remaining in the separate fund herein provided for at the end of the fiscal year not expended as herein provided for shall be covered into the treasury and shall be and become a part of the general fund of the state.

"Sec. 301. To whom licenses granted.—Licenses shall be granted only to persons who are trustworthy and competent to transact the business of a real estate broker or real estate salesman in such manner as to safeguard the interests of the public, and only after satisfactory proof has been presented to the board. An applicant for a real estate broker's license shall prove his competency to the commission by the taking of an examination prescribed by the board either in written form or by oral questionnaire; said examination relating to the principles of real estate practice and of business ethics pertaining thereto, and said applicant in addition to the original license fee shall pay an examination fee of five dollars, which examination fee shall cover all examinations prior to the issuance of such original broker's license. The applicant must be a person whose application has not been rejected in this or any other state within two years prior to date of application.

"Sec. 302. Requisites of application.—Every applicant for a real estate broker's license shall apply therefor in writing upon blanks prepared or furnished by the real estate commission. Such application shall be accompanied by the recommendation of at least two citizen real estate owners, not related to the applicant, who have owned real estate for a period of one year or more, and who have known applicant

for a period of six months, in the county in which said applicant resides, or has his place of business, which recommendation shall certify that the applicant bears a good reputation for honesty, truthfulness, fair dealing and competency, and recommending that a license be granted to the applicant. Every application for a broker's license shall state the name of the person, firm, partnership, co-partnership, association or corporation with which he will be associated in the business of real estate, and the location of the place, or places, for which said license is desired and set forth the period of time, if any, which said applicant has been engaged in the real estate business. Every applicant for a license shall furnish a sworn statement setting forth his present address, both of his business and residence, a complete list of all former places where he may have resided or been engaged in business for a period during the last five years, accounting for such entire period, and the length of such residence, together with the name and address of at least one real estate owner in each of said counties where he may have resided or have been engaged in business, and whether he has been convicted of a criminal offense involving moral turpitude, and if so, what offense. Every applicant for a salesman's license shall, in addition to the requirements of this section, also set forth the period of time, if any, during which he has been engaged in the real estate business, stating the name and address of his last employer, and the name and the place of business of the person, firm, partnership, co-partnership, association or corporation then employing him, or into whose service he is about to enter. The application shall be accompanied by a written statement by the broker in whose service he is about to enter, stating that in his opinion the applicant is honest, truthful, and of good reputation, and recommending that the license be granted to the applicant. Every application for a license, under the provisions of this chapter, shall be accompanied by the license fee herein prescribed. In the event that the commission does not issue the license, the fee shall be returned to the applicant. The commission is expressly vested with the power and authority to make and enforce any and all such reasonable rules and regulations connected with the

application for any license as shall be deemed necessary to administer and enforce the provisions of this chapter. All such rules and regulations to be subject to the approval of the governor.

"Sec. 303. Hearing and determination before granting or refusing.—The commission, after application in proper form has been filed, shall, before refusing to issue a license, set the application down for a hearing and determination as hereinafter provided in section 306 of this title."

Indictment.

THE STATE OF ALABAMA, JEFFERSON COUNTY.

CIRCUIT COURT, BESSEMER DIVISION, OCTOBER TERM, 1941.

1. The Grand Jury of said County, charges that before finding of this indictment P. S. Strumpf whose name is otherwise unknown to this Grand Jury and within twelve months before the finding of this indictment, did, for a valuable consideration or compensation, as a whole or partial vocation, sell or offer to sell, buy or offer to buy, lease or offer to lease, rent or offer to rent, or otherwise negotiate the sale, purchase, or exchange of real estate or an interest therein as agent or salesman of another without having first procured a license from the Alabama Real Estate Commission, so to do as provided by law and contrary to law,

2. The Grand Jury of said County further charges, that before the finding of this indictment, P. S. Strumpf whose name is otherwise unknown to this Grand Jury and within twelve months before the finding of this indictment, did, for a valuable consideration or compensation, as a whole or partial vocation, sell or offer to sell, buy or offer to buy, lease or offer to lease, rent or offer to rent, or otherwise negotiate the sale, purchase or exchange of real estate or an interest therein as agent or salesman of another without having first procured a license, so to do as provided by law and contrary to law,

3. The Grand Jury of said County further charges that, before the finding of this indictment P. S. Strumpf whose

name is otherwise unknown to this Grand Jury and within twelve months before the finding of this indictment, did, for compensation or a valuable consideration, sell or offer to sell, rent or offer to rent, buy or offer to buy, lease or offer to lease, or otherwise negotiate the sale, purchase, or exchange of real property or an interest therein as a real estate salesman or a real estate broker without having first procured a license from the Alabama Real Estate Commission, so to do as provided by law and contrary to law,

4. The Grand Jury of said County further charges that, before the finding of this indictment, P. S. Strumpf, whose name is otherwise unknown to this Grand Jury and within twelve months before the finding of this indictment, did, for compensation or a valuable consideration, sell or offer to sell, rent or offer to rent, buy or offer to buy, lease or offer to lease, or otherwise negotiate the sale, purchase, or exchange of real property or an interest therein as a real estate salesman or a real estate broker without having first procured a license, so to do as provided by law and contrary to law against the peace and dignity of the State of Alabama.

Arthur Green, Deputy Solicitor.

Indictment.

THE STATE OF ALABAMA, JEFFERSON COUNTY.

CIRCUIT COURT, BESSEMER DIVISION, OCTOBER TERM, 1941.

1. The Grand Jury of said County, charges that before finding of this indictment that within twelve months before the finding of this indictment, Polakow's Realty Experts, Inc., a corporation, whose name is otherwise unknown to this Grand Jury, acting as the agent of another, did employ salesmen or agents compensated on a commission basis and which said agents had not first procured a license from the Alabama Real Estate Commission so to do, did sell or offer for sale as real estate salesmen or agents, real property or an interest therein, and contrary to law,

2. The Grand Jury of said County further charges that, before the finding of this indictment, Polakow's Realty Experts, Inc., a corporation, whose name is otherwise unknown to this Grand Jury and within twelve months before the finding of this indictment, for a valuable consideration or compensation as the agent of another and as a whole or partial vocation, did sell or offer to sell, rent or offer to rent, lease or offer to lease, or did otherwise negotiate the purchase, sale, or exchange of real property without having first procured a license from the Alabama Real Estate Commission, so to do and as provided by law and contrary to law, against the peace and dignity of the State of Alabama.

Arthur Green, Deputy Solicitor.

Propositions of Law.

Proposition I.

The right to work for a living in the common occupations of the community is of the very essence of personal freedom that it was the purpose of the 14th Amendment to procure.

Traux v. *Raich*, 239 U. S. 35;
N. C. Law Review, Vol. 17, page 1.

Proposition II.

The power to regulate a business does not necessarily include the power to exclude persons from engaging in it.

State v. *Harris*, 216 N. C. 746, 6 S. E. (2d) 854;
Replogle v. *City of Little Rock*, 166 Ark. 617, 267 S. W. 353, 36 A. L. R. 1333;
People ex rel. Durham Realty Corp. v. *LaFetra*, 230 N. Y. 429, 103 N. E. 601, 16 A. L. R. 152;
State v. *Porter*, 94 Conn. 639, 110 A. 59;
State of Ohio v. *Helvering*, 292 U. S. 360, 54 S. Ct. 725, 78 L. ed. 1037.

Proposition III.

The real estate business is a harmless, innocuous business and one's right to follow it cannot be destroyed by legislation.

Rawles v. *Jenkins*, 279 S. W. 350;
State v. *Harris*, 216 N. C. 746, 6 S. E. (2d) 854;
Williams v. *Standard Oil Co.*, 278 U. S. 235;
New State Ice Co. v. *Liebmann*, 285 U. S. 262;
Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522;
Ribnik v. *McBride*, 277 U. S. 350, 56 A. L. R. 1327;
Adams v. *Tanner*, 244 U. S. 590;
Bramley v. *State*, 2 S. E. (2d) 647;

Richardson v. *Coker*, 3 S. E. (2d) 636;
State v. *Dixon*, 215 N. C. 161, 1 S. E. (2d) 521;
Richey v. *Smith*, 84 Pac. 851, 5 L. R. A. (NS) 674;
Replogle v. *Little Rock*, 166 Ark. 617, 267 S. W. 353, 36 A. L. R. 1335;
City of Osceola v. *Blair*, 231 Iowa 771, 2 N. W. (2d) 83;
DeBerry v. *City of La Grange* (*Ga.*), 6 S. E. 146;
Bushman v. *Bechtel*, 114 Pac. 227;
Kent Stores v. *Wilentz, Atty. Gen.*, 14 Fed. Rep. 1.

Argument.

May it please the Court:

Mr. Tiedeman, in his work on *State and Federal Control of Persons and Property*, expressed the self-evident truth in the following language, at page 236:

> "No man's liberty is safe if the legislature can deny him the right to engage in a harmless calling."

This court many years ago placed the stamp of its approval upon the idea stated by the author, in the following language:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of personal freedom and opportunity that it was the purpose of the (14th) Amendment to secure."
>
> *Traux* v. *Raich*, 239 U. S. 35.

In view of these pronouncements, it would seem that the question of whether a man must obtain a permit in order to work as a real estate broker or real estate salesman would in a measure depend on whether the real estate business is a common occupation. If so, it would seem that the individual could not be required to obtain a permit to engage in an occupation of that kind. If not, the question would then

be whether the Alabama real estate law is a regulation of the real estate business or a law excluding persons from engaging in such business.

The authorities say that the power to regulate a business or occupation does not necessarily include the power to exclude persons from engaging in it. The question is exhaustively discussed in N. C. Law Review, Vol. 17, page 1:

State v. *Harris,* 216 N. C. 746, 6 S. E. (2d) 854.
Replogle v. *City of Little Rock,* 166 Ark. 617, 267 S. W. 353, 36 A. L. R. 1333.
People ex rel. Durham Realty Corp. v. *LaFetra,* 230 N. Y. 429, 130 N. E. 601, 16 A. L. R. 152.
State v. *Porter,* 94 Conn. 639, 110 A. 59.
State of Ohio v. *Helvering,* 292 U. S. 360, 54 S. Ct. 725, 78 L. ed. 1307.

The authorities cited also say that there is a well recognized gap between the regulation of a business or occupation and restrictions preventing persons from engaging in it, to which the court must pay careful attention. While many of the rights of man, as declared in the Constitution, contemplate adjustment to social necessities, some of them are not so yielding. Among them the right to earn a living must be regarded as inalienable. Conceding this, a law which destroys the opportunity of a man or woman to earn a living in one of the ordinary, harmless occupations of life by the erection of educational and moral standards of fitness is legal grotesquety.

State v. *Harris,* 216 N. C. 746, 6 S. E. (2d) 854.

In *Adams* v. *Tanner,* 244 U. S. 590, the attempt to make it unlawful to operate employment agencies was declared unconstitutional, and it was said that there was nothing in the nature of the business that in any way "threatens or

endangers the public health, safety or morals". In that case it was said:

> "Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way."

To like effect are:

Ribnik v. *McBride*, 277 U. S. 350, 56 A. L. R. 1327.
Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522.
Williams v. *Standard Oil Co.*, 278 U. S. 235.
New State Ice Co. v. *Liebmann*, 285 U. S. 262.

The Supreme Court of Georgia struck down a photography law.

Bramley v. *State*, 2 S. E. (2d) 647.

The Supreme Court of Georgia also struck down a law requiring an electrical contractor to submit to a decision of an examining board as to his ability to satisfactorily complete his contracts with citizens of the city.

Richardson v. *Coker*, 3 S. E. (2d) 636.

In *State* v. *Dixon*, 215 N. C. 161, 1 S. E. (2d) 521, the Supreme Court of North Carolina declared the North Carolina real estate law unconstitutional on the ground that it violated a provision of the North Carolina Constitution relating to local legislation, but in view of that court's decision in *State* v. *Harris*, 216 N. C. 746, 6 S. E. (2d) 854, it would seem that there could be no doubt about what the North Carolina court thinks about the constitutionality of the real estate law.

In the *Harris case* the Supreme Court of North Carolina struck down a state dry cleaning law. This case is one of the best recent cases dealing with the subject.

In *State ex rel. Richey* v. *Smith*, 84 Pac. 851, 5 L. R. A. (NS) 674, an act requiring journeymen plumbers to secure a license as a condition for carrying on their trade was declared unconstitutional.

The Supreme Court of Arkansas reached the same conclusion in *Replogle* v. *Little Rock*, 166 Ark. 617, 267 S. W. 353, 36 A. L. R. 1335.

The Supreme Court of Kentucky declared the Kentucky real estate law unconstitutional.

Rawles v. *Jenkins*, 279 S. W. 350.

In *Becker* v. *State*, 185 A. 93, the Superior Court of Delaware declared a dry cleaning law unconstitutional. The decision was based on the proposition that a citizen has a right to make a living in a common occupation without getting a permit from anybody so to do.

In *City of Osceola* v. *Blair*, 231 Iowa 771, 2 N. W. (2d) 83, decided February 10, 1942, the Supreme Court of Iowa declared an ordinance unconstitutional for forbidding the soliciting of orders for goods, wares and merchandise at private residences, and to like effect is *DeBerry* v. *City of La Grange* (Ga.), 6 S. E. 146.

In *Bushman* v. *Bechtel*, 114 Pac. 227, the Supreme Court of Arizona struck down a board of examiners for photography. It was ruled that the business of making photographs is not inherently dangerous to society, but is an entirely innocent occupation and that therefore the police power could not be used to prevent a person from following a business so innocuous, and that the effort to do so was a deprivation of a property right—the right to earn a living—without due process of law.

This court upheld the constitutionality of a blue-sky law in *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539. It was ruled that the integrity of securities can only be assured by the probity of the dealers in them and the information which may be given of them. That reason cannot apply to real

estate that everybody can see and which is assessed for taxes on a public record open to all.

Zerlin v. *La. Real Estate Board,* 103 So. 528; the *Pope Case,* 242 Pac. 290; *Roman* v. *Lobe,* 243 N. Y. 51, 152 N. E. 451, 60 A. L. R. 1329, and *State* v. *Rose,* 122 So. 225, apparently sustain a real estate law similar to the Alabama law.

A three-judge Federal Court declared the dry cleaning law unconstitutional in New Jersey in *Kent Stores* v. *Wilentz, Attorney General of New Jersey,* 14 Fed. Rep., page 1. An interesting classification of the Federal cases is found in the opinion in that case.

Polakow Realty Experts, Inc., is a corporation organized under the laws of the State of Alabama with power to buy, sell and exchange real estate. It could only act through an agent. The effect of the decision by the Supreme Court of Alabama is to say that this corporation cannot employ a person on salary or commission to sell its real estate, unless such person is a licensed real estate broker or a licensed real estate salesman, without being guilty of a crime. This has the effect of depriving the corporation of its property without due process of law.

It is respectfully submitted that the writ of certiorari should issue to the end that this court may properly review the erroneous decision complained of.

This may easily be one of the most important cases ever brought to this court for decision. The right of an American citizen to earn his living by the sweat of his brow, in a common, ordinary innocuous occupation without obtaining a permit, is the main question in the case.

Respectfully submitted,

HORACE C. WILKINSON,
Counsel for Petitioners.

(4932)